The future of International criminal law

Is the honeymoon over?

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WHY ICL? HOW ICL? WHAT IS THE RECORD?

There are options - national courts, regional courts, non-judicial remedies ...
Why punish international crimes in international courts?

- Utilitarian
  - Specific & general deterrence
  - Incapacitation
  - Rehabilitation

- Retributive just deserts - *lex talionis*

- “Affirmative prevention aimed at influencing the legal awareness ... that the legal system is being implemented and enforced” (Blaskic, Germany)

- Hearing from victims, survivors, witnesses (*Eichmann*)
Questioning the justifications for international punishment

• Is *deterrence* really credible -
  • w/r/t high government officials?
  • Ordinary soldiers obeying orders/community norms?
  • Are international prosecutions likely to deter?

• How can *incapacitation* succeed in cases involving thousands of offenders?

• *Who* is the proper subject of *retribution* -
  • High officials who planned/directed the crimes
  • Individual actors/génocidaires

• Who decides? How?
Basic legal protections (are these universal norms)

- **Legality**
  - No crime, no punishment without law

- **Fair notice**
  - No condemnation without prior notice

- **Non-retroactivity**
  - Criminal laws may not be applied retroactively

- **Lenity**
- **Presumption of innocence**
- **Proof beyond a reasonable doubt required**
- **Procedural protections**
- **Ethical duties of prosecutors**
Issues in the international sphere

• Criminal law is accepted as binding on everyone within its terms -
  • Who accepts these prescriptions?
  • Is there general agreement on criminal norms?
    • What are examples of exceptions?

• If criminal punishment expresses the moral condemnation of the community -
  • What is the community for the purposes of ICL?

• May a State choose to prosecute/or decline, disagreeing with an international tribunal -
  • Example, Truth & Reconciliation Commission in South Africa, gacaca process in Rwanda
International Crimes *Stricto Sensu*

- “Core” or “great crimes”
  - Genocide
  - Crimes against Humanity
  - War Crimes
  - Aggression
  - Torture, Cruel, Inhuman & Degrading Treatment
  - Crimes of Sexual Violence
INTRODUCTION TO INTERNATIONAL CRIMES

Defined by the ICC and other tribunals in statute, treaty and cases
Sources of International Criminal Law

• Nuremberg statute
  • CCL 10

• Ad hoc tribunal statutes
  • ICTY (Tribunal for the Former Yugoslavia)
  • ICTR (Tribunal for Rwanda)

• Other treaties & conventions
  • Genocide Convention
  • Convention Against Torture
  • Geneva Conventions

• Rome Statute
  • Substantive elements of crime & creates the ICC
The Nuremberg Charter
/London Agreement

Article 6

• Asserts power to try all persons “acting in the interests of the European Axis countries” as “individuals or members of organizations”

• Identifies 3 crimes:
  • Crimes against Peace
  • War Crimes
  • Crimes Against Humanity

• For which there shall be individual responsibility
Art. 6(a) - Crimes Against Peace

- War of aggression or
- War in violation of treaty
- Includes - planning, preparation, initiation and waging war
- Includes conspiracy to do any of the above
Article 7

• No defense of “official positions”
  • Including heads of state and
  • Responsible officials in government departments

• No defense
  • No mitigation of punishment

• What are the reasons for eliminating these defenses?
Article 8

- No defense for lower ranking individuals
- “that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility ...”
- *But* it may mitigate punishment
- In the interest of justice
Comment on Art. 8

• Justice Jackson: “The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind....
Crimes covered in the Rome Statute

- Art. 5, Art 17, Art. 70, Art. 71
- Genocide
- Crimes against humanity
- War crimes
- Aggression
  - Since 2018
- Obstruction of justice-related offenses
  - Perjury, witness tampering, bribing officials, contempt
Territorial and personal jurisdiction

- Art. 12
- Security Council referral or
- Was the crime
  - Committed within the territory or
  - By a national
  - Of a state party or
  - A state that consents to ICC jurisdiction
Who is a “person” subject to ICC jurisdiction?

- Art. 12 - ICC jurisdiction is limited to natural persons
- Why not include
  - States?
  - Organizations?
Triggers for ICC jurisdiction

- Arts. 13 - 15
- Was the situation
  - Referred by a state party
  - Referred by the Security Council
  - Initiated by the prosecutor
    - After approval by the Pre-Trial Chambers
ICC is a court of secondary jurisdiction

- Art. 17 - is a state with jurisdiction over the crime investigating or
  - Prosecuting or
  - Refusing to prosecute?

- Is the state willing & able to prosecute?
  - Why did the state decline?

- Is the crime sufficiently grave for the ICC?
SOME SUBSTANTIVE LAW, A BRIEF OVERVIEW

CAH, Genocide, Torture, War Crimes, Aggression
Crimes Against Humanity (ICC definition)

- The following crimes, when committed as part of a widespread or (and) systematic attack
  - Directed against any civilian population
  - With knowledge of the attack

- Large list of murder-type crimes (see next slide)

- Other inhumane acts of similar character, intentionally causing great suffering, serious physical or mental injury

- Persecution against any “identifiable group” or political, racial, national, ethnic, cultural, religious, gender, or other “universally recognized impermissible grounds”
Categories of crimes

• “murder type crimes”: murder, extermination, enslavement, deportation, torture, rape, other inhumane acts

• Grave crimes of sexual violence

• Apartheid

• Disappearance

• Forcible transfer of a population
Genocide

- Genocide is an international crime
- When committed –
  - During war or
  - Peacetime
- Which the Parties undertake to
  - To prevent and
  - To punish
Article 2 defines Genocide

- Genocide means any of the specified acts committed, with intent to destroy, in whole or in part, a national, ethnical, racial or religions group, as such

1. An act (the actus reus)
2. With respect to a protected group
3. Done with specific intent to destroy a group
Article 2 defines the specific acts

- Killing
- Causing serious bodily or mental harm
- Deliberately inflicting conditions calculated to bring about physical destruction
- Imposing measures to limit births
- Forcibly transferring children to another group
Why does the crime focus on intent to destroy a group?

- Lemkin says: “the destruction of a nation, therefore, results in the loss of its future contributions to the world.”

- For the purpose of defining the crime of genocide, the group is more than a collection of individuals.
Torture - ICC Rome Statute

Torture is criminalized in:

• Crimes against Humanity
  • Art. 7(1)(f), and
• War Crimes
  • Art. 8(2)(a)(ii) - 1
Article 7 (1) (f)
Crime against humanity of torture\textsuperscript{14}

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were in the custody or under the control of the perpetrator.

3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
Article 8 (2) (a) (ii)-1
War crime of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
Torture, defined

- Is clear definition of torture possible?
- Judge Posner:
  - “[t]he word ‘torture’ lacks a stable definition....”what is involved in using the word is picking out the point along a continuum at which the observer’s queasiness turns to revulsion.”
TRIBUNALS

Nuremberg, ICTY, ICTR, ICC

Other Tribunals: Cambodia, East Timor, Lebanon, Sierra Leone
Evaluating the Courts

• Are they necessary?
• Are they effective?
• Are they fair and equitable in case selection?
• Do they provide justice for victims of international crimes and protection for witnesses?
• Should international courts lead or act as back-up to national courts?
Nuremberg Palace of Justice
The first international tribunals

Nuremberg Tribunal - 1 international trial, 22 defendants
  • Convened by the Allied Powers with shared competence by the Nuremberg Charter (1945)
    • Establishes the Tribunal, identifies jurisdiction
    • Recognizes 3 crimes
      • Crimes against peace
      • War crimes
      • Crimes against humanity
    • Describes criminal responsibility, eliminates certain defenses

Tokyo Tribunal (1945)
  • Created by Special Proclamation, trials led by U.S. chief counsel and associates from allies
Nuremberg 2 - additional trials

- Representative categories of defendants:
  - Doctors
  - Judges
  - Other government officials & ministers
  - Corporations & corporate officials

- Representative crimes charged:
  - Treatment of POWs
  - Crimes against civilians
22 defendants

- 12 capital sentences, 3 life sentences, 4 term sentences (10 - 20 years), 3 acquittals
ICTY (now the MICT)
ICTY Jurisprudence

• ICTY mission statement: ‘bringing war criminals to justice, bringing justice to victims’

• Pioneered protection for witnesses

• Leading cases define crimes against humanity and genocide

• Defendants included heads of state, high military officers and also individual military, police and lower ranking individuals
BBC News, “In 2003 Yugoslavia disappeared from the map of Europe. Replaced for a short time by the looser union of Serbia and Montenegro, the latter broke away in 2006. Two years later, Kosovo’s majority ethnic Albanians declared independence from Serbia.”
Creation of the Tribunal

- 1992 - Helsinki Watch reports on war crimes in Bosnia in violation of international humanitarian law or the law of war
- UN Security Council Res. 780
  - Commission of Experts to investigate
- UN Security Council Res. 827
  - ICTY Tribunal established
  - Judges elected by the General Assembly
- Dayton peace accords - 1995
ICTY Activities

• [http://www.icty.org/action/timeline/254](http://www.icty.org/action/timeline/254)

• 1994 - prosecutor Richard Goldstone appointed
  • First indictment & request for deferral

• 1995 - more indictments, totaling 46
  • Including Karadžić and Mladić

• 1996 - Tadić
  • First guilty plea

• 1997 - Tadić judgment of guilty
ICTY Proceedings

- 1998 - first acquittal
- 1999 - Milošović indictment
  - First indictment of a head of state
- 2000 - first international trial charging crimes of sexual violence as crimes against humanity and war crimes
- 2005 - Bosnia War Crimes Chamber established
- 2006 - first life sentence, for the siege of Sarajevo
- 2010 - Karadžić trial
- 2011 - Mladić arrested, trial proceeding
- 2017 - completion strategy proceeding with the MICT

http://www.unmict.org/en
ICTY Statute

• Art. 1
  • The Tribunal has “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”

• Potential defendants
  • Natural persons only

• Defenses
  • No head of state defense
  • No defense for following orders
Specific Substantive Crimes

- **War crimes**
  - Grave breaches of the Geneva Conventions
  - War crimes including excessive destruction; banned weapons

- **Crimes against humanity**
  - Murder, deportation, extermination, enslavement, persecution, other inhumane acts
  - and imprisonment, rape, torture (against civilians, in armed conflict)
    - See Nuremberg CCL No. 10

- **Genocide**
Jurisdiction

• Concurrent
  • ICTY or
  • Domestic courts
  • But ICTY has priority

• Compare to ICC
  • International Criminal Court or
  • Domestic courts
  • But domestic courts have priority
Record of the ICTY

• Established in 1993 to deal with conflicts in the region from 1991 - 2001

• 161 individuals indicted
  • 90 convicted & sentenced, 19 acquitted, 37 terminated or dismissed,
  • 20 guilty pleas
  • 13 referred to national courts
  • 2 trials ongoing at the MICT

• First prosecutor: Richard Goldstone
International Criminal Tribunal for Rwanda

Yale University, Genocide Studies Program, at http://www.yale.edu/gsp/rwanda/
Rwanda Tribunal (ICTR)

• Created by the UN Security Council
  • Exercising its chapter VII powers
  • Previously established in Tadić

• SC findings:
  • genocide created a “threat to international peace and security”
  • A Tribunal would meet Art. 39 requirement
    • to restore and maintain international peace
  • And contribute to national reconciliation
ICTR Record

• Opened in 1995 to investigate and prosecute crimes, including genocide, in Rwanda in 1994
• First international tribunal to convict on the crime of genocide
• Cases: 93 indictments, 62 convicted & sentenced, 8 fugitives
  • 14 acquitted, 10 referrals to national courts, 3 referred to MICT, 2 deceased before or during trial, 2 indictments withdrawn
• Last trial judgment - 2012, completion strategy, referral to national courts ongoing
ICTR Jurisprudence

• First international tribunal to define rape as a means of perpetrating genocide

• Defendants included heads of state and military, militia members, members of the media, members of religious groups

• First international decision recognizing media broadcasts as incitement to commit genocide
Record of the ICC

- Rome Statute entered into effect 2002 after ratification by 60 States
  - Current States Parties - 123
- Case status - 10 preliminary exams, 11 investigations, 26 cases, 15 defendants at large
- Investigations ongoing in situations in Burundi, CAR, Mali, Cote d’Ivoire, Libya, Kenya, Darfur Sudan, Uganda, DRC
- Preliminary examinations ongoing in Afghanistan, Columbia, Gabon, Guinea, Honduras, Iraq/UK, Nigeria, Palestine. The Philippines, Ukraine, Venezuela
ICC trial record

- 26 cases, 4 convictions (1 on appeal, 3 at the reparations/compensation stage)
  - Charges: war crimes including using child soldiers, crimes against humanity, genocide
- 4 trials pending - Gbagbo and Ble Goude (Cote d’Ivoire), Ntaganda (DRC) Banda (Darfur Sudan), Ongwen (Uganda)
- 1 appeal,
- 3 at reparations stage
- 6 closed
ICC courtroom
Examples of arrest warrants issued

• Situation in Darfur, Sudan: *Prosecutor v. Omar Hassan Ahmad Al Bashir*, President of the Republic of Sudan (2009, 2010)
  • Charging individual responsibility as an indirect co-perpetrator
    • 2 counts of war crimes, 5 counts of CAH, 3 counts of genocide

• Situation in Uganda: *Prosecutor v. Joseph Kony* (and others) alleged commander-in-chief, Lord’s Resistance Army (warrant issued 2005)
  • Charging individual responsibility
  • 12 counts of CAH, 21 counts of war crimes
Special Court for Sierra Leone

- (approved 2002, trials opened 2004, court closed 2013, residual court for witness protection, supervision, records management ongoing)
  - Precedents include indictments for war crimes of recruitment of child soldiers, attacks on UN peacekeepers, CAH of forced marriages, conviction of head of state Charles Taylor (claim of immunity rejected on appeal, sentence - 50 years, to be served in the UK) (5 cases, 10 defendants indicted)
  - National TRC process
Special Tribunal for Lebanon (STL)

- opened 2007, sealed indictments issued 2011, UN mandate extended to 2018
  - 5 individuals indicted, trial phase began 2014, trials are in absentia
  - Subject matter: investigation of 2005 assassination of former President Rafik Hariri and others, and related crimes under international and national law
Special Tribunal for Cambodia, the ECCC (extraordinary Chambers in the Court of Cambodia)

• Subject: alleged crimes committed by the Khmer Rouge between 1975 - 1979
• Tribunal comprises Cambodian and international judges & prosecutors
• **Case 1** charged former head of detention center (guilty of CAH and war crimes, sentence appeal pending). **Case 2** against (now) 2 individuals divided into 2 phases; phase 1 (2014, guilty of CAH, sentence of life imprisonment, on appeal), phase 2 (indictments for genocide, trial started 2015). **Cases 3 & 4**, confidential investigations
AFTER THE GLAMOUR OF INTERNATIONAL TRIBUNALS ....

What is the future of ICL: a large permanent court, more UN-created ad hoc and hybrid tribunals, national and regional courts?
Assessing the Tribunals

- Are they legitimate
  - In the view of the victims
  - The defendants
  - The public beyond the borders
- Should the work of the Tribunals be publicized
  - If so, has that goal been met
- Witness protection issues
- What are other goals of the Tribunals
- What is the future of ad hoc UN Tribunals?
Evaluating the international criminal project

- Are international tribunals necessary?
- Are they effective?
- Are they fair and equitable in case selection?
- Do they provide justice for victims of international crimes and protection for witnesses?
- Should international courts lead or act as back-up to national courts?
Examples of new approaches

- Kosovo Specialist Chambers & Specialist Prosecutor’s Office
  - 2014 agreement between the Republic of Kosovo and the European Union
  - Jurisdiction: transboundary and international crimes “in the aftermath of the conflict in Kosovo” 1/1/98 - 12/31/00
  - Primary jurisdiction over Kosovo courts
  - Jurisdiction - crimes against humanity, war crimes, violations of Kosovo criminal law
  - After investigation of war crimes, organ trafficking and harvesting, in 2014, Chief Prosecutor of the Special Investigative Task Force announces it has sufficient evidence to file an indictment. 2016, the Specialist Prosecutor takes over the matter
War Crimes Chamber - Bosnia & Herzegovina

- 2004 and 2006 Agreements with ICTY for
  - Transfer of cases
  - Admissibility of evidence collected by ICTY
  - Extradition
- The Court & Prosecutor’s Office are operating
  - At least 13 guilty verdicts since 2008 including 4 guilty pleas and 9 post-trial verdicts since 2006 (indictments
- Jurisdiction - war crimes under the Criminal Code of Bosnia and Herzegovina
District Courts, Republic of Croatia

- Proceedings under national law in national District Courts
- Charges: war crimes
Planning the Future - a few issues

• What are the justifications for Tribunals
  • Deterrence? Justice & retribution? Something else?
• Identity & position of defendants - charge who?
• Plea bargaining on such crimes - improper?
• Truth & reconciliation commissions - necessary or optional?
• Local control or international management?
• Cost/benefit
  • Tribunals are expensive & slow
  • Should be money be spend otherwise? How?